COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-892

B.K. & another[1]

vs.

WILLIAM R. KELLEY, JR.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from a multimillion dollar judgment on a jury verdict in favor of his daughters on their allegations that he sexually abused them over the course of many years. At trial, the defendant, who had previously pleaded guilty to criminal charges concerning the abuse,[2] conceded liability and the trial proceeded as to damages only. On appeal, the defendant argues that various errors by the judge entitle him to a new trial or to a remittitur of damages. We affirm.

Background. The defendant sexually molested and abused his two daughters, B.K. and W.K., on thousands of occasions. He molested B.K. approximately three to five times per week when

[1] W.K. We use initials instead of the plaintiffs' names.

[2] The defendant pleaded guilty to multiple counts of indecent assault and battery on a child under the age of fourteen years, and indecent assault and battery on a child who has attained the age of fourteen years.

she was between the ages of twelve and fifteen, and continued to molest her on various occasions when she was sixteen and seventeen years old. On an almost nightly basis, the defendant entered her room, undressed, got into bed with her, and fondled her breasts and her "butt." On one particular night, he rubbed her breast and buttocks, and pressed his erection against her. He rubbed her breasts, stomach, and underwear over her vagina. He encouraged her to masturbate and sleep in the nude, and explained to her how to give a "hand job."

Similarly, the defendant began molesting W.K. when she was twelve, and continued to do so through her middle school and high school years. The abuse happened almost every night unless the defendant was away. He placed his hands under her shorts and underwear, and slid his hand back and forth over her inner thigh and buttocks. He touched, caressed, and groped her breasts. While molesting her, he told her that she "had such a nice ass." The defendant required that his daughters kiss him good night and good morning. On these occasions, he gave W.K. a wet, open-mouth kiss. He told W.K. how to give oral sex, and showed her his erect penis on more than one occasion. The defendant also masturbated on one occasion while he molested her.

Both daughters testified extensively about the impact, devastation, and emotional distress caused by the years of abuse

from the defendant. The plaintiffs' expert, Dr. Thomas Gutheil, a forensic psychiatrist, testified that in his opinion, to a reasonable degree of medical certainty, both daughters suffered emotional injuries caused by the defendant's sexual abuse. He opined that the sexual abuse caused the plaintiffs' depression, anxiety, suicidal ideation, and problems with sexual relationships.

The defendant did not testify or offer any other evidence at trial, relying only on cross-examination of the two plaintiffs, the plaintiffs' older sister, and Dr. Gutheil. On special questions, the jury awarded the plaintiffs $1.5 million each on their claims for assault and battery and $3.5 million each on their claims for intentional infliction of emotional distress. The defendant sought to poll the jury to determine whether the damages awards on the two counts were duplicative. The judge denied the request. The defendant filed a motion for new trial or for remittitur arguing that the damages awarded were both excessive and not supported by substantial evidence. After a nonevidentiary hearing, the judge denied the motion, in a written memorandum.

Discussion. 1. Extraneous influence. On appeal, the defendant argues that the judge's failure to inquire of the jury, concerning the potential influence of an emotional outburst by a spectator during plaintiffs' counsel's opening

statement, constituted prejudicial error and required the allowance of his motion for a mistrial or subsequent motion for a new trial. We disagree.

Neither the attorneys nor the judge noticed any disruption during the trial. The next day of trial, however, defense counsel moved for a mistrial because a spectator reportedly[3] had stood up during the plaintiffs' opening statement, said "Jesus," and "stormed out of the courtroom." The judge recounted that he saw an individual stand up and leave, but did not see or hear anything inappropriate, and rejected counsel's characterization that the individual stormed out. The judge said that he "didn't hear any statements [despite] listening for that just in case." He further found that the person who left the courtroom "did nothing inappropriate." The defendant again raised this argument in his motion for new trial, which the judge again rejected, determining that "the Court did not hear, nor did either side's counsel hear the individual say anything. There was no noticeable reaction from the jury when the individual left the courtroom."

A party claiming an extraneous influence on the jury must make a "colorable showing" that it may have had an impact on the jury, Commonwealth v. Dixon, 395 Mass. 149, 151-152 (1985), and

[3] Defense counsel gleaned this information from a potential expert witness for the defendant.

such showing must be more than mere speculation. Commonwealth v. Lynch, 439 Mass. 532, 545 (2003). We accord substantial deference to the trial judge in these matters, as he was "in the best position to evaluate all the circumstances of the exposure to the extraneous matter, and its actual prejudicial effect." Commonwealth v. Hardy, 431 Mass. 387, 392 (2000).[4] Given the judge's direct observation that no disruption occurred, his direct observation of the jury at the relevant time, and his finding that nothing inappropriate occurred, there is no basis to conclude that he abused his discretion in declining to grant a mistrial or a new trial. See Riley v. Davison Constr. Co., 381 Mass. 432, 444 (1980) (declaration of mistrial within sound discretion of trial judge). Furthermore, the defendant never requested a voir dire of the jury. Compare Commonwealth v. Pena, 455 Mass. 1, 10 (2009) (no abuse of discretion in refusing to conduct voir dire of jurors allegedly exposed to potential extraneous influence).

[4] "The standard that a trial judge is to apply on a motion for a new trial in a civil case is whether the verdict is so markedly against the weight of the evidence as to suggest that the jurors allowed themselves to be misled, were swept away by bias or prejudice, or for a combination of reasons, including misunderstanding of applicable law, failed to come to a reasonable conclusion. The decision to grant or deny a motion for a new trial rests in the discretion of the trial judge, and an appellate court will not vacate such an order unless the judge has abused that discretion." W. Oliver Tripp Co. v. American Hoechst Corp., 34 Mass. App. Ct. 744, 748 (1993) (citations omitted).

2. Duplicative damages. The defendant next argues that the damages awarded for the separate counts of assault and battery and intentional infliction of emotional distress were duplicative and must be vacated. He claims that although the judge instructed the jury not to enter "duplicative damages," he "did not clarify these instructions when discussing the jury verdict form." The argument is unavailing.

The defendant did not object at trial to the special verdict form, which permitted separate damage calculations for each count. Indeed, defense counsel specifically confirmed that the special verdict form was acceptable. Furthermore, the judge specifically instructed the jury that they could not award duplicative damages, and the defendant did not object to this instruction.[5] See Reckis v. Johnson & Johnson, 471 Mass. 272, 304 n.49 (2015) (jury presumed to have followed trial judge's instruction on damages). Having agreed to the jury verdict form and instructions at trial, the defendant cannot complain on appeal that they somehow confused the jury. See Fecteau Benefits Group, Inc. v. Knox, 72 Mass. App. Ct. 204, 208 n.12 (2008) (defendant's argument that verdict form was "necessarily confusing" waived where defendant did not object to verdict form

[5] The judge instructed, in relevant part, "I must explain a cardinal rule of law. That no party in a civil case is entitled to duplicative recoveries of damages on separate legal theories for the same set of facts, circumstances, or injuries."

below). In addition, the judge stated that he did not see any confusion from the verdict, and did not abuse his discretion in denying the defendant's request to poll the jury. See, e.g., Nelson v. Economy Grocery Stores Corp., 305 Mass. 383, 388 (1940).

In addition, there was ample evidence adduced at trial to support the damages awarded for the separate and distinct acts committed by the defendant. The evidence showed that the defendant physically molested his daughters on an almost nightly basis, which supported the damages for the assaults and batteries. The evidence further demonstrated that the defendant routinely and repeatedly engaged in extreme and outrageous conduct toward his daughters, apart from the physical assaults, which supported damages for separate conduct and injuries sustained from the intentional infliction of emotional distress.[6]

3. Instructions on sympathy and punitive damages. The defendant argues that he is entitled to a new trial because the

[6] This conduct, which was presented to the jury at trial and need not be repeated here in full detail, included, inter alia, the defendant masturbating in bed while adjacent to his daughter; repeatedly paying his daughters in exchange for them dropping their towels, "flashing him," and exposing themselves to him; instructing his daughter how to give a boy a "hand job"; encouraging his daughter to masturbate and sleep naked; pulling back the shower curtain while his daughter was bathing and staring at her; teaching his daughter how to give a "blow job," taking out his erect penis, and showing it to his daughter; and instructing his daughter to have sex with her boy friend "doggy-style" because she had "such a nice ass."

judge's instructions did not adequately convey that damages should not be based on sympathy for the plaintiffs or an attempt to punish the defendant. This argument has no merit. At the defendant's request, the judge used the language of the model instruction on damages to explain that "the purpose is not to reward the plaintiff and not to punish the defendant." See Massachusetts Superior Court Civil Practice Jury Instructions § 2.1.13 (Mass. Cont. Legal Educ. 3d ed. 2014). He also instructed, at the defendant's request, that "[t]here are no punitive damages in this case." The judge also told the jurors that they could "not decide the case based on sympathy for any party or witness." These instructions were clear and correct, and the defendant did not object thereto. There was no error.

4. Posttrial motions. The defendant argues that his motion for a directed verdict should have been allowed because there was insufficient evidence to support the necessary element of a physical manifestation of the injury caused by the defendant's intentional infliction of emotional distress. Citing Payton v. Abbott Labs, 386 Mass. 540, 556-557 (1982), he asserts that to establish emotional distress damages for the tort of assault and battery, the injured party must provide some objective evidence in support. The claim is without merit.

The portion of Abbott Labs cited by the defendant concerns the need to prove physical harm as a result of negligently

inflicted emotional distress. There is no such requirement for intentionally inflicted emotional distress. See id. at 554-555. To the extent that the defendant contends that there was "no objective evidence" that the plaintiffs' distress was severe or that the defendant's actions caused lingering harm, he fares no better. There was abundant evidence and expert testimony at trial concerning the causal connection between the defendant's constant and repeated sexual abuse of the plaintiffs, and the resulting impacts on the plaintiffs, including evidence of the emotional distress, suicidal ideation, anxiety, depression, nightmares, issues with sexual relations, fear of having children, and fear caused by his conduct.

The defendant also contends that his motion for new trial should have been allowed due to the jury's "potential misinterpretation" of a statement made by the plaintiffs' sister as it implied that she, too, was a third victim.[7] This testimony was elicited in the context of B.K. explaining her disclosure of the abuse. The judge rejected this argument in his denial of the motion for new trial because (a) the statement simply referred to the disclosure of W.K.'s abuse and did not suggest that the sister had been abused as well, and (b) there was no prejudice where the defendant conceded liability, had pleaded

[7] B.K. testified that her sister asked her, "[d]id it happen to you?" B.K. responded, "yes."

guilty to multiple counts of indecent assault and battery, and there was testimony of thousands of conceded incidents of sexual abuse of the plaintiffs. The judge was in a far superior position than this court to make this determination, and we discern no error or abuse of discretion in his findings or ruling. See W. Oliver Tripp Co. v. American Hoechst Corp., 34 Mass. App. Ct. 744, 748 (1993).

Finally, the defendant argues generally that the damages award was excessive and his request for a remittitur should have been allowed. Ordinarily, we will not disturb a damages award unless permitting it to stand was an abuse of discretion amounting to an error of law. Reckis, 471 Mass. at 299. Here, in his decision denying the request for remittitur and motion for new trial, the judge noted the credible evidence of thousands of sexual assaults perpetrated by the plaintiffs' father over the course of several years. He found that the plaintiffs' "description of the emotional damage suffered by them at the hands of their father was powerful, credible and compelling." He described the particular harm testified to by each plaintiff, as described, supra. In addition, the plaintiffs' expert testified about the emotional injuries suffered by them and "the special damages that result from intra familial sexual abuse." The judge determined that the size of the verdict was not so large that it "shocks the sense of

justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption." Labonte v. Hutchins & Wheeler, 424 Mass. 813, 825 (1997) (quotation omitted). He concluded that the question was "not a very difficult [one] for this court" and that he was satisfied that a compensatory award of $5 million for each of the plaintiffs was "appropriate, reasonable and just." We find nothing in the record to suggest that the judge abused his discretion. See Truong v. Wong, 55 Mass. App. Ct. 868, 873-874 (2002) ("An appellate court will not find an abuse of discretion in the judge's refusal to grant a new trial on the ground of excessive damages, unless the damages awarded were greatly disproportionate to the injury proven or represented a miscarriage of justice. This deference is particularly appropriate when the judge deciding the motion is the trial

judge") (quotation omitted).

Judgment affirmed.

Order denying motion for new trial or order of remittitur affirmed.

By the Court (Milkey, Hanlon & Neyman, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: June 9, 2016.

[8] The panelists are listed in order of seniority.